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10 *Attorneys for Specially-Appearing Defendant*  
11 *Navigators Insurance Co.,*  
12 *dba Navigators Protection & Indemnity*

13 IN THE DISTRICT COURT OF GUAM

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 vs.

17 MARWAN SHIPPING & TRADING CO.,  
18 FIVE SEAS SHIPPING CO., LLC, and S.J.  
19 GARGRAVE SYNDICATE 2724, *in*  
20 *personam,*

21 Defendants.

22 AND CROSS-CLAIMS,  
23 COUNTERCLAIMS, AND CLAIM IN  
24 INTERVENTION

Civil Case No.: 06-00011

25 **SPECIALLY-APPEARING DEFENDANT**  
26 **NAVIGATORS INSURANCE**  
27 **COMPANY'S REPLY TO GARGRAVE'S**  
28 **OPPOSITION TO NAVIGATORS'**  
**MOTION TO SET ASIDE DEFAULT**  
**AND DISMISS FIRST AMENDED**  
**THIRD-PARTY COMPLAINT**

Judge: Honorable Frances Tydingco-  
Gatewood

- 23 • Gargrave does not dispute that it has the burden to establish that its attempted service on  
24 Navigators was valid.
- 25 • Gargrave admits that Navigators was dismissed from this action on Nov. 2, 2007 and "As  
26 of that date, Navigators was no longer a party to this lawsuit." Booth Declaration ¶ 12  
27

28  
SPECIALLY-APPEARING NAVIGATORS REPLY  
TO GARGRAVE'S OPPOSITION TO NAVIGATORS'  
MOTION TO SET ASIDE DEFAULT

Civ. Case No. 06-00011; Our File No. 2900.81

**FILED**  
DISTRICT COURT OF GUAM

FEB 19 2008

JEANNE G. QUINATA  
Clerk of Court

1 found in Exh. B to Gibson Declaration in Support of Motion to Set Aside Default  
2 previously filed herein.

- 3 • Gargrave admits that it did not file its motion for leave to file a third-party complaint  
4 until Nov. 14, 2007 less than two weeks after Navigators was dismissed from the action  
5 on Nov. 2, 2007 and no longer a party.
- 6 • Gargrave admits that the **only** basis for claiming it served Navigators, a non-party to the  
7 action, by serving Sterling and Gibson is that Gibson had been admitted *pro hac vice* as  
8 counsel for Navigators when Navigators was a party to the action and that Sterling was  
9 Navigators' local counsel when Navigators was a party to the action.
- 10 • Gargrave cites no case law or procedural rule allowing for service of a new third party  
11 complaint on a dismissed party by service on counsel who has been admitted *pro hac vice*  
12 to represent the now dismissed party.
- 13 • Gargrave admits that it did not serve a summons for the third party complaint on either  
14 Sterling (See Tarpley Supplemental Declaration filed herein Feb. 13, 2007) or Gibson  
15 (See Booth declaration filed herein on Feb. 12, 2007 which does not mention a  
16 summons).

### 17 **Gargrave Has Failed to Sustain its Burden of Proving Valid Service**

18 The proper manner for service of a new complaint on a previously-dismissed party can be  
19 a complicated issue. The law places the burden on Gargrave to prove proper service on  
20 Navigators and if there is any doubt, that doubt should be resolved against Gargrave and FRCP 4  
21 service required. Wright & Miller set forth the correct rule: "[T]he constitutional standards for  
22 personal jurisdiction must be met with regard to each claim; Rule 5 cannot be used as a means to  
23 circumvent the Due Process Clause." Wright & Miller, Federal Practice and Procedure: Civil 3d

1 §1146, p.440. Guam local rules are consistent. LR 4.1 states that service of a summons and  
2 complaint are governed by Rule 4 of the FRCP. LR 5.1 requires that all documents **after the**  
3 complaint be served pursuant to rule 5, FRCP. Here, Gargrave improperly used LR 5.1 to serve  
4 the complaint itself.  
5

6 Gargrave waited until Navigators was dismissed and then within 12 days brought its  
7 motion to amend to file a new third-party complaint against Navigators. Why? Gargrave has not  
8 shown why it could not have filed the motion to amend while Navigators was still a party. The  
9 only possible reason is that once it was dismissed, Navigators had no standing to oppose  
10 anything a remaining party to the action was filing, including Gargrave's motion to amend to  
11 bring Navigators back into the action. Now, after making it clear to the Court that Navigators  
12 was no longer a party when Gargrave wanted to file an amended third-party complaint against  
13 Navigators, Gargrave would have the Court treat Navigators as a party for the purpose of serving  
14 the new complaint so it can ignore the due process requirements of Rule 4 of the FRCP.  
15  
16

17 Gargrave is also erroneous in claiming that Navigators is still a party because the Court  
18 did not issue a final judgment as to Navigators' dismissal pursuant to FRCP 54. FRCP 54 is  
19 inapposite to the current issue. Navigators does not contest that the Court's dismissals of  
20 Navigators were not appealable orders. Finality for purposes of appeal is not the issue. Who  
21 would appeal a voluntary dismissal without prejudice? To use the "finality" argument, without  
22 support of any case authority, to conclude that Navigators was a party to the action for purposes  
23 of service of a new complaint makes no sense. Such "reasoning" ignores the reality that at the  
24 time of the order dismissing Navigators from the action on Nov. 2, 2007, no other parties had  
25 any claims pending against Navigators. Thus, there was no reason for those remaining parties to  
26 seek a demand for Judgment under FRCP 54 allowing them to immediately appeal the dismissal.  
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1 Similarly, why would Navigators seek an order allowing it to immediately appeal the order  
2 dismissing it from this action? The fact other parties were “thinking about” bringing an action  
3 against Navigators does not relieve Gargrave of its obligation to serve Navigators personally as  
4 required by Rule 4.  
5

6 Moreover, it is admitted that no summons was served on either counsel. That by itself is  
7 sufficient grounds to set aside the default.

8 In light of the due process implications, Navigators respectfully requests that the Court  
9 quash the current attempted service and require that service of process be made directly on  
10 Navigators as required by FRCP 4. Alternatively, if the Court is concerned regarding the  
11 application of FRCP 5, the Court should exercise its discretion under 5 (b)(1) and order service  
12 directly on Navigators. “If a party is represented by an attorney, service under this rule must be  
13 made on the attorney unless the court orders service on the party.” (Emphasis added))  
14  
15

#### 16 **Good Cause Exists to Set Aside The Default**

17 Even assuming the Court agrees that Gargrave properly served process on Navigators by  
18 serving its counsel, “[t]he court may set aside an entry of default for good cause.” FRCP 55(c);  
19 Guam LTR 11(c) (“For reasons deemed sufficient by the Court and upon motion expeditiously  
20 made, the Court may set aside a default”). A “standard of liberality should be applied in  
21 considering a motion to set aside a default” with a preference that cases “be decided on their  
22 merits.” Medunic v. Lederer, 533 F.2d 891, 893-894 (3d Cir. 1976)(citation omitted); see also  
23 Johnson v. Barlow, 2007 U.S. Dist. LEXIS 5325 (E.D. Cal. 2007). “Put simply, if any good  
24 reason exists to set aside the default, the court should find good cause for doing so.” Charity v.  
25 Carroll, 2006 U.S. Dist. LEXIS 66759, 10 (E.D. Cal. 2006). A strong factor in favor of setting  
26 aside the default is if the moving party acts quickly to set aside the default. Johnson, supra, 2007  
27  
28

1 U.S. Dist. LEXIS at 8. Navigators acted promptly. Gargrave filed its motion for entry of default  
2 on January 23, 2008 and Navigators filed its motion to set aside the default on February 6, 2008.

3  
4 Good cause "is demonstrated by: 1) a sufficient excuse for not meeting the filing  
5 deadline; 2) a meritorious defense; and 3) that setting aside default will not unfairly prejudice the  
6 other party." Johnson, supra, 2007 U.S. Dist. LEXIS at 4 (citing Madsen v. Bumb, 419 F.2d 4, 6  
7 (9th Cir. 1969); Mendoza v. Wight Vineyard Management, 783 F.2d 941, 945 (9th Cir.  
8 1986)(other citations omitted)) Any of the three factors alone is sufficient to set aside a default.  
9  
10 Johnson, supra, 2007 U.S. Dist. LEXIS at 5 (citing Franchise Holding H, LLC. v. Huntington  
11 Restaurants Group, Inc., 375 F.3d 922, 926 (9th Cir. 2004)).

12 Navigators' objection to the sufficiency of service is certainly good cause because, if  
13 successful, no answer at all would be required until proper service was made. As discussed  
14 above, no summons was included with the purported service. Also, there is no dispute that  
15 Navigators was no longer a party to this action. Navigators did not idly sit back until a  
16 mischievous opportunity presented itself to raise the issue of service. As Gargrave's counsel  
17 admits in its opposition, Gargrave was immediately and repeatedly made aware that Navigators  
18 did not believe it had been properly served. At a minimum, Navigators' objection is reasonable  
19 and understandable under the circumstances and a sufficient excuse even if the Court ultimately  
20 does not uphold Navigators' position. Certainly, Navigators "offers a credible, good faith  
21 explanation negating any intention to take advantage of the opposing party, interfere with  
22 judicial decision making, or otherwise manipulate the legal process." TCI Group Life Ins. Plan  
23 v. Knoebber, 244 F.3d 691, 697 (9th Cir. 2001).

24 To establish the meritorious defense, a moving party's burden is merely "producing  
25 competent evidence that establishes a factual or legal basis for the tendered defense." Johnson v.  
26  
27  
28

1 Barlow, 2007 U.S. Dist. LEXIS 5325 at 9 (citing Tri-Continental Leasing Corp. v. Zimmerman,  
2 485 F.Supp. 495 (N.D. Cal. 1980); Falk v. Allen, 739 F.2d 461, 464 (9th Cir. 1984) (“On a Rule  
3 60(b) motion, this court will accept the allegations of the movant's factual statement.”). “The  
4 rule requires a sufficient elaboration of facts to permit the trial court to judge whether the  
5 defense, if movant's version were believed, would be meritorious. The allegations may be  
6 satisfactorily presented in the written motion itself, in an appended proposed answer, or in  
7 attached affidavits.” In re Stone, 588 F.2d 1316, 1319-1320 (10th Cir. 1978); see also Girlsongs  
8 & Warner Bros. v. Starkey, 108 F.R.D. 275, 278 (N.D. Cal. 1984).

9  
10  
11 Gargrave’s Complaint prays for judgment against Navigators in favor of the United  
12 States. However, Gargrave admits that in November 2007, Gargrave settled that claim with the  
13 United States and “has now paid the \$800,000....” (see Declaration of Forrest Booth Of  
14 Amounts Due and In Support of Entry of Default Judgment, ¶ ¶5,6). Gargrave’s cause of action  
15 disappeared when Gargrave settled its claim before serving Navigators with the Complaint.  
16 Gargrave attempted to serve the Complaint on November 30, 2007. (See Declaration of Thomas  
17 M. Tarpley in Support of Request For Entry of Default, ¶4).

18  
19 Moreover, Navigators has more than sufficient law and facts to refute all of Gargrave’s  
20 claims, including, but not limited to, the failure to state a cause of action for recovery of any  
21 insurance proceeds from Navigators based on alleged breach of the policy because nowhere does  
22 Gargrave claim to be an insured under the policy; the fact the policy is one of indemnity only;  
23 the fact that defendant Marwan herein has made no claim against Navigators for indemnity for  
24 wreck removal under the policy arising out of the events alleged by the USA in this action; the  
25 legal position that there was no wreck removal as matter of law compensable under the P&I  
26 policy and many others. Many of the legal arguments and facts are set forth in Navigators  
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1 motion to dismiss or stay, filed on July 17, 2007 with this court in Action 07-00010. Navigators  
2 requests that the Court take judicial notice of that motion and its supporting declarations.

3  
4 Finally, Gargrave's allegations of Navigators' liability arising out of the alleged  
5 appointment and recall of surveyor Paul Thomas can be shown to be false from official U.S.  
6 Coast Guard records. Navigators disputes that it appointed Paul Thomas. Contrary to  
7 Gargrave's allegations, Navigators can establish that verbal notice of federalization was given to  
8 vessel owners on Aug. 23, before the Ajman 2 went aground. The USCG was in direct contact  
9 with owners at that time, not Thomas. The vessel went aground at 2250 on Aug. 23 and written  
10 confirmation that the project was federalized was provided at 1800 on Aug. 24, before Thomas  
11 was appointed or even on Guam. Therefore, it was not possible as Gargrave alleges in ¶ 9 of its  
12 Amended Third Party Complaint that "as a direct result of Mr. Thomas .... having disappeared  
13 from Guam, ..... the Coast Guard "federalized" and took control of the vessel and the  
14 incident..." Gargrave has been informed of these facts and is well aware of them.

15  
16  
17 **Conclusion**

18 The Court should proceed with caution in considering whether or not Rule 5 service of a  
19 new complaint on a dismissed party is valid. Gargrave has the burden of proving Rule 5 service  
20 valid under the circumstances. It is admitted that Navigators was not a party to this action when  
21 Gargrave attempted to serve its First Amended Third-Party Complaint on Navigators' counsel.  
22 In attempting to sustain its burden that service was proper given this fact, the best Gargrave can  
23 come up with is that Navigators' counsel was admitted *pro hac vice* before successfully having  
24 Navigators dismissed from the action. Given the due process implications of not requiring  
25 service under Rule 4, Navigators respectfully requests that the Court quash Gargrave's attempted  
26 service of process and order that Gargrave serve Navigators personally pursuant to Rule 4 of the  
27  
28

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1 FRCP. If the Court does not agree with Navigators regarding the insufficiency of service,  
2 Navigators submits that it has shown more that sufficient good cause for not responding timely  
3 to the questionable service and that the default should be set aside on those grounds and  
4 sufficient time allowed for Navigators to respond to the Complaint. At a minimum, that will  
5 allow the issues and claims made by Gargrave to be addressed on their merits.  
6

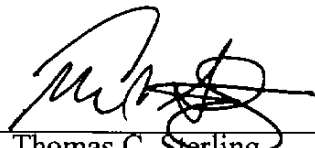
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8 DATED: February 19, 2008

Respectfully submitted,

9 Stanley L. Gibson  
10 GIBSON ROBB & LINDH LLP

11 BLAIR STERLING JOHNSON  
12 MARTINEZ & LEON GUERRERO

13  
14 By

  
15 Thomas C. Sterling  
16 Attorneys for Defendant  
17 NAVIGATORS INSURANCE CO., d.b.a.  
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